Mohamed Sadik bin Mohamed Ali & Anor v Menteri Dalam Negeri & Ors

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO 25–22–01 OF 2015
HANIPAH FARIKULLAH J
3 FEBRUARY 2017

Administrative Law — Judicial review — Application for — Applicants applied for judicial review against respondents' order under s 1(c) of Part II Second Schedule of the Federal Constitution — Whether applicants exceeded one year limit in registration of birth

Constitutional Law — Citizenship — Registration — Whether procedural non-compliance can undermine substantive right to citizenship by operation of law

The applicants filed for judicial review for declaration that the birth of two applicants had been registered under s 1(c) of Part II Second Schedule of Federal Constitution ('the Constitution'). Both the applicants were born in India on 24 March 1980 and 15 December 1981 respectively. Within one month of the first applicant's birth, the mother applicants wrote a letter to the Office of the Assistant High Commissioner for Malaysia ('Assistant High Commissioner') to register his birth. Following that, there was correspondence between the Assistant High Commissioner and the applicants' mother whereby she sent in all the relevant documents required by the consulate. The father of the applicants had attempted to register the second applicant's birth whereby he had taken numerous steps between birth of the second applicant in 1981 and September 1996. The applicants then applied for an extension of time to register their births in order to obtain Malaysian citizenship under art 14(1)(b) of the Constitution and read together with s 1(c) of Part II, Second Schedule of the Constitution. However, the first respondent rejected the applicants' application. Hence, the applicants applied for judicial review against the first respondent's decision.

Held, application allowed:

(1) The time period of the registration was a mere procedural requirement and should not overshadow the fact that by operation of law, the applicants were Malaysian citizens (see para 20).

(2) The respondents had erred by stating that the first respondent's discretion to disallow an extension of time for registering a birth in order to affect citizenship by operation of law was a non-reviewable matter. This had

undermined the applicants' substantive right to citizenship and rejected an application for an extension of time by magnifying the failure to fulfill a procedural requirement. Thus, both the applicants were automatically Malaysian citizens by operation of law under art 14(1)(b) of the Constitution (see para 24).

(3) The respondents had failed to take into account that the applicants' father was a Malaysian citizen at the time of birth of the first and second applicant, the applicants' mother held permanent residence status in Malaysia and the applicants' parents had taken all necessary steps and measure to register the births of the applicants (see para 25).

[Bahasa Malaysia summary

Pemohon-pemohon telah memfailkan tindakan semakan kehakiman untuk perisytiharan bahawa kelahiran kedua-dua pemohon didaftarkan di bawah s 1(c) Bahagian II Jadual Kedua Perlembagaan Persekutuan ('Perlembagaan'). Kedua-dua pemohon dilahirkan di India pada 24 Mac 1980 dan 15 Disember 1981 masing-masing. Dalam tempoh masa sebulan selepas pemohon pertama dilahirkan, ibu pemohon telah menulis surat kepada 'Office of the Assistant High Commissioner for Malaysia' ('Assistant High Commissioner') untuk mendaftarkan kelahirannya. Berikutan itu, terdapat surat-menyurat di antara Assistant High Commissioner dengan ibu pemohon di mana beliau menghantar dokumen relevan diperlukan oleh konsulat. Bapa pemohon telah cuba untuk mendaftarkan kelahiran pemohon kedua dengan mengambil pelbagai langkah di antara tarikh lahir pemohon kedua pada 1981 dan September 1996. Pemohon-pemohon telah memohon pelanjutan masa untuk mendaftar kelahiran mereka bagi memperoleh kewarganegaraan Malaysia di bawah perkara 14(1)(b) Perlembagaan dan dibaca bersama s 1(c) Bahagian II Jadual Kedua Perlembagaan. Walau bagaimanapun, responden pertama telah menolak permohonan itu. Justeru, pemohon-pemohon telah memohon tindakan semakan kehakiman terhadap keputusan responden pertama.

Diputuskan, permohonan dibenarkan:

(1) Tempoh masa untuk pendaftaran adalah merupakan keperluan prosedur dan tidak sepatutnya membayangi fakta bahawa melalui operasi undang-undang, pemohon-pemohon merupakan warganegara Malaysia (lihat perenggan 20).

(2) Responden-responden telah tersilap dalam menyatakan bahawa budi bicara responden pertama dalam tidak membenarkan pelanjutan masa untuk mendaftarkan kelahiran bagi menjejaskan kewarganegaraan melalui operasi undang-undang adalah perkara yang tidak boleh disemak semula. Perkara ini telah mempertikaikan hak substantif pemohon terhadap kewarganegaraan dan menolak permohonan pelanjutan masa dengan memperbesarkan kegagalan untuk memenuhi keperluan

prosedural. Oleh itu, kedua-dua pemohon secara automatik merupakan warganegara Malaysia melalui operasi undang-undang di bawah perkara 14(1)(b) Perlembagaan (lihat perenggan 24).

(3) Responden-responden telah gagal mengambil kira bahawa bapa pemohon-pemohon merupakan warganegara Malaysia pada waktu kelahiran pemohon pertama dan kedua, ibu pemohon-pemohon adalah memegang status penduduk tetap di Malaysia dan ibu bapa pemohon-pemohon telah mengambil pelbagai langkah yang diperlukan untuk mendaftarkan kelahiran pemohon-pemohon (lihat perenggan 25).]

Notes

For cases on application for judicial review, see 1(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 329–407.

For cases on citizenship in general, see 3(2) *Mallal's Digest* (5th Ed, 2015) paras 2397–2415.

Cases referred to

Foo Toon Aik (suing on his own behalf and as representative of Foo Shi Wen, Child) v Ketua Pendaftar Kelahiran dan Kematian, Malaysia [2012] 9 MLJ 573; [2012] 4 CLJ 613, HC (refd)

Haja Mohideen bin MK Abdul Rahman & Ors v Menteri Dalam Negeri & Others [2007] 8 MLJ 1, HC (refd)

Kulawante (an infant) v Government of Malaysia & Anor [1978] 1 MLJ 92 (refd)

Yong Lee Hua @ Piang Lin v Director of National Registration Sabah & Anor [2011] 3 MLJ 684, HC (refd)

Legislation referred to

Citizenship Rules 1960 (revoked)

Federal Constitution arts 14(1), 14(1)(b), 15(2), Second Schedule, Part II, s (1)(c), Part III

Latheefa Koya (Raul Lee Baskaran with her) (Daim & Gamany) for the applicants.

Lina Hanini Ismail (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Hanipah Farikullah J:

[1] The applicant filed for judicial review for the following reliefs:

(i) Suatu perintah Certiorari untuk membatalkan keputusan Responden Pertama yang dimaklumkan melalui surat-surat yang dimaklumkan melalui surat-surat yang bertarikh 3 November 2014 yang mana Responden Pertama telah memutuskan bahawa pendaftaran kelahiran

Pemohon-Pemohon di bawah Seksyen 1(c), Bahagian II, Jadual Kedua, Perkara 14(1)(b)) Perlembagaan Persekutuan bagi memperolehi taraf kewarganegaraan melalui kuatkuasa undang-undang tidak berjaya;

(ii) Suatu Deklarasi yang mengiktirafkan bahawa kelahiran Pemohon-Pemohon didaftarkan di bawah Seksyen 1(c), Bahagian II, Jadual Kedua, Perkara 14(1)(b)) Perlembagaan Persekutuan dan memperolehi taraf kewarganegaraan secara kuatkuasa undang-undang (operation in law);

(iii) Suatu perintah Mandamus mengarahkan Responden Kedua untuk mengeluarkan kad pengenalan MyKad yang mengiktirafkan Pemohon-Pemohon sebagai warganegara Malaysia secara kuatkuasa undang-undang ('operation in law') di bawah Perkara 14(1)(b) dengan segera; dan

(iv) Suatu Deklarasi bahawa Responden-Responden telah memungkiri hak asasi Pemohon-Pemohon dan hak-hak yang diperuntukkan di bawah Perlembagaan Persekutuan dan undang-undang lain yang memperuntukkan perkhidmatan atau faedah sebagai seorang warganegara Malaysia.

THE BACKGROUND FACTS

[2] The relevant facts are as follows.

[3] The first applicant was born on 24 March 1980 in Thanjavur, India and the registration was done on 27 March 1980.

[4] The second applicant was born on 15 December 1981 in India and was registered on 12 January 1982.

[5] The applicants' had applied for an extension of time to register their births on 21 May 2014 to obtain Malaysian citizenship under art 14(1)(b) of the Federal Constitution and read together with s (1)(c) of Part II, Second Schedule based on the reason below:

(a) the applicant's father is a Malaysian citizen via registration under art 15(2) Constitution of the Federation of Malaya, Citizenship Rules 1960 since 12 May 1962;

(b) the applicants' mother was an India citizen had married the applicants' father on 4 December 1975 and registered their marriage in Malaysia on 22 May 1985; and

(c) the marriage between the parents that was done on 4 December 1975 had confirmed by Pejabat Agama Islam Petaling Jaya on 4 January 1993.

[6] The applicants' application for an extension of time to register their births was submitted by the second respondent to the first respondents on 21 May 2014.

[7] The first respondent had decided to reject the applicants' application on 24 September 2014 and the letter to inform the same to the applicants dated 3 November 2014.

UNDISPUTED FACTS

[8] The following facts are not disputed:

(a) the first applicant ('Mohamed Sadik') was born in Thanjavur District in India on 24 March 1980 to SN Mohamed Ali (father) and KA Najmunnisa (mother);

(b) the second applicant ('Mazmeen') was born in India on 15 December 1981 to SN Mohamed Ali (father) and KA Najmunnisa (mother);

(c) SN Mohamed Ali and KA Najmunnisa were in a lawful marriage dated 30 January 2015;

(d) SN Mohamed Ali is the father to both the first and second applicants; and

(e) SN Mohamed Ali has been a Malaysian citizen since 12 May 1962 and as such was a Malaysian citizen at the time the first and second applicants were born.

DECISION

[9] Learned counsel for the applicants submitted that the first and second applicants qualify as citizens of Malaysia by operation of law pursuant to art 14(1)(b) and s 1(c) of Part II Schedule 2 of the Federal Constitution.

[10] On the contrary, learned senior federal counsel contended that the decision of the first respondent is reasonable and within his discretion whether to grant or not the extension of time.

[11] In support of the respondent's case, learned senior federal counsel relied on s 1(c) of Part II Second Schedule.

[12] Section 1(c) of Part II of the Second Schedule of the Federal Constitution provides as follows:

> 1 Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say;

> Every person born outside the Federation whose father is at the time of the birth are citizen and whose birth is, within one year of its occurrence or within such longer period as the Federal Government may in any particular case allow, registered at a consulate of the Federation or, if it occurs in Brunei or in a territory prescribed for this purpose by order of the yang di-pertuan Agong, registered with the Federal Government; and ...

[13] In this regards, the respondent contended that failure to comply with qualifications specified under s 1(c) of Part II, Second Schedule, Federal Constitution and the refusal by the Federal Government to grant an extension of time would trigger the operation of provisions under Part III of the Federal Constitution by virtue of the phrase appearing at the beginning of art 14(1) of the Federal Constitution 'Subject to the provisions of this part'.

[14] In the High Court case of *Foo Toon Aik (suing on his own behalf and as representative of Foo Shi Wen, Child) v Ketua Pendaftar Kelahiran dan Kematian, Malaysia* [2012] 9 MLJ 573; [2012] 4 CLJ 613, Rohana Yusof J (now JCA) explained what 'operation of law' means:

> It must be noted that art 14 read together with Second Schedule Part II s 1(a) lays down the requisites of a citizen by operation of law in very clear term. A person who meets all the criteria therein would qualify to become a citizen under that provision. There is no room for an exercise of discretion under art 14. Hence the argument of learned counsel that the respondent should weigh conflict of consideration between immigration policy and the welfare of a child simply cannot arise here, since there is no room for any discretion to be employed under art 14. The test to be applied is whether a person qualifies all the necessary requirements of art 14. Once the requisite conditions under these provisions are met it is automatic that a person is a citizen by operation of law.

[15] In the light of *Foo Toon Aik*'s case, there are two aspects to the acquisition of citizenship by operation of law. Firstly, there is no room for any discretion. Secondly, once all the requisite requirements are met, the person is automatically a citizen.

[16] Abdul Rahman Sebli J in the High Court case of *Yong Lee Hua @ Piang Lin v Director of National Registration Sabah & Anor* [2011] 3 MLJ 684 held that whether or not a person qualified 'as a citizen by operation of law is purely a question of fact'. Once those facts are established, the respondents do not have discretion to decide whether or not citizenship should be granted.

[17] Based on s 1(c), Second Schedule Part II of Article 14(1)(b) of the Federal Constitution are the requirements that an applicant must fulfill before he can be said to be a Malaysian citizen by operation of law are as follows:

(i) he was born on or after Malaysia day;

(ii) he was born outside the Federation;

(iii) at the time of his birth his father was a Malaysian citizen; and

(iv) that his birth is registered at a consulate of the Federation within a year of its occurrence or within such longer period as the Federal Government may in any particular case allow.

THE FIRST APPLICANT

[18] Requirements (i), (ii) and (iii) above are not disputed. Requirement (iv) was achieved on 21 April 1980 when the applicants' mother wrote a letter to the Office of the Assistant High Commissioner for Malaysia in Madras to register the birth of the first applicant. This occurred within a month of the first applicant's birth. Following that, the correspondence between the mother of the applicants and the Office of the Assistant High Commissioner for Malaysia shows that honest efforts were made by sending in all the necessary documents the consulate required. However, the Office of the Assistant High Commissioner never completed the application for the registration until 26 April 1989 when the replied stating that the application was not approved.

THE SECOND APPLICANT

[19] The evidence shows that the father of the applicants had attempted to register the second applicant's birth on 15 December 1981 upon the second applicant's birth on 15 December 1981 upon the second applicant returning to Malaysia with her family in 1984 (see in exhs MSMA9, MSMA10 and MSMA11). The applicants' father had taken numerous steps between the birth of the second applicant in 1981 and September 1996 to apply for entry permits, including appeals to immigration authorities and Ministry authorities. As such the respondents' claims that no good reasons were given to substantiate a late registration of birth by the second applicant.

[20] Even though the details of when the application for the registration of the birth began is uncertain, I accept the applicants' submission that the time period of the registration is a mere procedural requirement and should not overshadow the fact that by operation of law, the applicants are citizens of Malaysia.

[21] In *Haja Mohideen bin MK Abdul Rahman & Ors v Menteri Dalam Negeri & Others* [2007] 8 MLJ 1, the plaintiffs similarly sought the declaration of citizenship under s 1(c), Second Schedule, Part II of art 14(1)(b) of the Federal Constitution for the two children born to a Malaysian father and an Indian (national) mother in Tamil Nadu, the court held as follows:

(1) A cursory reading of art 14(1)(b) and Part II of the Second Schedule of the FC tends to suggest that the father must have two distinct 'qualifications' of equal importance. First, the father must be a citizen at the time of the child's birth and second, he must register the birth within one year or such longer period as the Federal Government may in any particular case allow (see para 17).

(2) But a closer examination of the provision yields to the construction that there is in fact only one primary qualification in the true sense that an applicant must satisfy to qualify as a citizen of this country, that is to say, that his father must be a citizen when he was born. The other 'qualification' is purely a secondary requirement that complements the primary qualification requiring the registration of the birth within a year, or such longer period as the Federal Government may allow. The process is purely a procedural requirement which requires the exercise of discretion on the part of the Government (see para 18).

(3) ...

(4) In making a decision, the Federal Government would in fact be making a decision under a social contract between a citizen and the Federal Government. It must not unreasonably refuse to allow a longer period of registration bearing in mind that the infraction is only of a secondary rule of procedure. A refusal to allow a longer period may therefore provide a course of action by which the reasonableness of the minister's decision may be examined by the court. The Federal Government is bound to consider only the reason or reasons why he failed to register on time and a refusal may only be justified where the reason proffered was so unreasonable and unacceptable that it outweighs the second and third plaintiffs' right to citizenship. A rational decision based on a balance of justice should not allow a mere procedural non-compliance to undermine their substantive right to citizenship by operation of law (see paras 24, 26 & 33).

[22] The second applicant's registration of birth was done out of the one-year period prescribed in s 1(c) and that the discretion for the extension of time to register a birth lies with the Home Minister.

[23] In *Kulawante (an infant) v Government of Malaysia & Anor* [1978] 1 MLJ 92, Yussof J held:

> The effect of section 2 of Part III of the Second Schedule of the Federal Constitution (ouster provision) which purport to preclude the jurisdiction of the court has been decided in a series of cases in our courts beginning with *Soon Kok Leong v Minister of Interior, Malaysia* [1968] 2 MLJ 88 and recently in the decision of the court in *Mak Sik Kwong v Minister of Home Affairs, Malaysia* [1975] 2 MLJ 168 and in the latter case, relevant authorities have been quite exhaustively dealt with. In those cases the courts have held that this ouster provision does not preclude the courts from entertaining an application for an order of certiorari to quash the decision of

A a statutory tribunal where there was an error of law apparent on the face of the record.

...

For these reasons, I am of the view that in a proper case, the court is not precluded B by reason of the 'ouster provision' only, to entertain a claim for declaration that an individual is a citizen. But whether the court would entertain a claim for declaration that the plaintiff is eligible for registration as a citizen under a relevant provision of the Federal Constitution, as it is sought in this case, involves different considerations and the court should also construe other provisions of the law relating to citizenship to determine the effect of such declaration. C

[24] Hence the respondents have erred by stating that the first respondent's discretion to disallow an extension of time for registering a birth in order to affect citizenship by operation of law is a non reviewable matter. Doing so, the D respondents are thereby undermining the applicants' substantive right to citizenship by operation of law on a mere procedural requirement. The respondents completely disregarded the substantive right of the applicants to citizenship and rejected an application for an extension of time by magnifying the failure to fulfill a procedural requirement. The fact that the reason for E rejection given is that the applicants had exceeded the one year time limit in their registration of birth shows that the respondents did not take into consideration the substantive right of the applicants and allowed the non-compliance of the procedural requirement to be fatal.

F **[25]** It is clear that the respondents have failed to take into account the following:

(a) the applicants' father was a Malaysian citizen at the time of birth of the first and second applicant;

G (b) the applicants' mother holds permanent residence status in Malaysia; and

(c) the applicants' parents have taken all necessary steps and measures to register the births of the applicants.

H CONCLUSION

[26] Based on the above reasons, in my view Mohamed Sadik and Mazmeen are automatically Malaysian citizens by operation of law under art 14(1)(b). I

Application allowed

Reported by Jacqueleen Kho